No. 15943

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

RICHARD HAROLD HANSEN,

Appellee.

Appeal from the United States District Court for the District of Montana

BRIEF FOR APPELLEE

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STATEMENT

The statement of appellant in its brief as to Opinion Below, Jurisdiction and Statement of the Case is accurate and it is not necessary to here restate such matters. The appellee will proceed immediately to the argument of the case.

ARGUMENT

This case is simple. The Government had two choices to make, either to procure an indictment without mentioning the classification given to the registrant, or merely allege that he was a person subject to induction into the armed forces and refused to submit to induction contrary to the Act. Had the Government framed such an indictment without alleging the classification of the defendant, then the demurrer could not possibly have been sustained. The case is as simple as this.

Suppose the Government had returned an indictment and alleged that the defendant had been classified I-O, which would have obliged him to perform civilian work, and had gone on to allege that he had refused to submit to induction into the armed forces, as was done in this case. Had such been done, no one would have the hardihood to argue that a sufficient indictment was alleged. The indictment on its face would show that the defendant under Section 6 (j) of the Act (50 U. S. C. App. § 456 (j), 65 Stat. 83) would not be under any duty to submit to induction under the Act and the indictment would, on its face, be insufficient.

There is no difference between this hypothetical situation and the situation in this case. The Government chose to frame its indictment in such a manner as would give rise to the presumption of no duty under the Act. The case here is somewhat similiar to *United States* v. *Britton,* 107 U. S. 655, 668-670 (1882).

The case of the Government is similar to the illustration familiar to every school student in study of criminal law. If an indictment charges that a defendant stole a horse the indictment allows the Government to prove the theft of any color horse. But if the indictment alleges that the defendant stole a white horse, then it is not permissible to prove that he stole a black one. If an indictment alleges that a man transported a Buick automobile across the state line, knowing that it was stolen, and the proof shows he transported a Ford automobile, there would be a variance.

While the subject of variance is not involved in this case, the illustrations above set out prove that the Government must allege in an indictment facts sufficient to show the commission of an offense.

Where an indictment alleges facts that give rise to an exemption the responsibility is upon the Government to negative such exemption. The Government here alleges that the defendant was classified in I-A-O. This classification under 50 U. S. C. 456 (j) specifically exempted him from combatant military training and service. Title 50 U. S. C. § 456 (j), 65 Stat. 83, provides:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. . . . Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President . . . "

Since the Government chose to allege that the defendant was classified I-A-O, it should have gone forward a step further and alleged that he refused to submit to induction into the armed forces for assignment to noncombatant service only, pursuant to 50 U. S. C. App. § 456 (j).

The trial judge wrote a very clear and well-reasoned opinion. He referred first to the indictment and quoted it, showing that it alleged that appellee "was classified 1-AO" and refused to perform a duty "to be inducted into the Armed Forces of the United States of America." (R. 7) The trial judge then quoted from 50 U. S. C. App. § 456 (j). (R. 7-8) Here he showed that the Act exempted from combatant training and service one who is classified as was the appellee here. He then states the position of appellee on his motion

perform a duty and there is no duty of a person classified I-A-O to be inducted into the armed forces for unlimited military service. In order to allege properly the imposition of such a duty on the appellee it should have been alleged that the appellee failed to submit to induction or assignment as a noncombatant.

The appellant argues, on page 7 of its brief, that the appellee would have available the writ of habeas corpus in event he was illegally assigned. While this may be true, it is immaterial in considering proper pleading. The judicial remedy of habeas corpus challenged invalid military action against a member of the armed forces in no way lightens the duty imposed upon the Government in respect to compliance with proper rules of pleading.

The Government has alleged that the appellee was a conscientious objector ordered to perform full military training and service. The indictment on its face shows that there was no duty on the part of the appellee to perform full military training and service since he had been classified in I-A-O, as stated in the indictment. This being true, no offense was alleged and it was the duty of the trial court to dismiss the indictment.

CONCLUSION

It is respectfully submitted that the order of the court below, dismissing the indictment, should be affirmed.

Respectfully submitted,

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